

2007 WL 4943911 (Del.Ch.) (Trial Motion, Memorandum and Affidavit)
Chancery Court of Delaware.
New Castle County

Archibald W. LINGO, Plaintiff,
v.
Dinah H. LINGO, Defendant.

No. 1622-MG.
August 16, 2007.

Plaintiff's Opposition to Defendant's Motion for Protective Order

Duane Morris LLP, [Daniel V. Folt](#) (Del. I.D. No. 3143), [Matt Neiderman](#) (Del. I.D. No. 4018), 1100 N. Market St., Suite 1200, Wilmington, DE 19801, 302.657.4900 (telephone), 302.657.4901 (facsimile), Attorneys for Plaintiff.

Plaintiff Archibald W. Lingo, by and through his undersigned counsel, responds in opposition to Defendant Dinah H. Lingo's Motion for Protective Order as follows:

INTRODUCTION

1. This motion - which has been brought by substitute counsel who were not present at the deposition more than one year after that deposition took place - should be denied for failure to establish the good faith basis required for the relief sought. Both the guardianship and trust actions before this Court concern serious allegations of **financial exploitation** by Dinah Lingo. As Tim Barron, then Deputy Delaware Attorney General and head of the Delaware **Elder Abuse and Exploitation** Project said in his remarks to the Committee on Commerce, Science and Technology, on August 4, 1999, "**financial exploitation** means the illegal or improper use of an infirm senior's resources by another person for profit or other advantage." Sadly, in those cases, just as the evidence will show in this case, "the **financial exploiter**, like the child sex offender, is often a family member or acquaintance of the victim, and has embarked on a gradual process of cultivating the victim's trust." *Id.* "Once that trust has been gained, the crime becomes a series of crimes over a lengthy period of time: credit card purchases, MAC withdrawals, check writing, CD cash-ins and more." *Id.* Intervention occurs, therefore, usually months - perhaps even years - after the **exploitive** process has been set in motion - and, regrettably, often after the victim's life savings have been exhausted." *Id.*

2. Dinah Lingo is the person whom the Petitioner has alleged has **financially exploited** her **elderly** and infirm mother, Eleanor Lingo. The evidence adduced to date proves both impairment and **exploitation**. A medical report recently obtained by Dinah from Johns Hopkins (attached as Exhibit "A") confirms that Eleanor is not only currently suffering from Alzheimer's, but that the onset of her mental impairment dates back at least seven or eight years - long before Dinah obtaining a power of attorney and amended will, both for her own benefit. The few documents produced in this case confirm Dinah's misappropriation of assets and raise even more questions about the true extent of that **exploitation**. We have recently learned, for instance, that in the six years Dinah has exercised control over the trust and Eleanor's assets, the trust generated approximately \$1.8 million in income, but Dinah has spent or transferred for her own benefit approximately \$1.7 million. In just one year (2002), Dinah deposited approximately \$336,000 into the trust account, but Dinah wrote checks during that same totaling more than \$392,000 - resulting in a net loss for Eleanor and the trust of almost \$60,000. During that same time, and despite having no source of income, Dinah has established personal banking and investment accounts worth hundreds of thousands and has managed to capitalize a failed business and other investments. Even more troubling is what we do not know. The amount of rents deposited into the trust account has varied greatly from one year to the next since Dinah took control and began to make cash collections. Rents thus range from \$336,000 in 2002 to only \$217,000 in 2004 - begging the question of where the rental income went if it

was not deposited into the trust account. Archie has been forced to retain, at his own substantial expense, a forensic accountant to assist in reviewing the records of the trust in order to determine the extent of the loss.

3. in view of the serious allegations of **financial exploitation**, Dinah Lingo's deposition consisted of the cross-examination of a hostile witness in a non-jury civil matter. No objections to any of the challenged questions were made by the *two* attorneys who were present then, and who defended Dinah Lingo's deposition. Nor did present counsel previously seek a protective order when this deposition was twice scheduled for continuation. Instead, this motion suddenly appears thirteen months after the deposition was taken, in apparent retaliation to Petitioner's filing of a motion to hold Dinah Lingo in contempt for violation of the status quo order. As with most of the other collateral matters raised by the many motions and letters filed by Respondent Dinah Lingo, we are concerned that the purpose of these filings seems more to be to disparage Petitioner and his counsel, and less to be related to the narrow issues that must be decided in the pending guardianship and trust actions.

4. in any event, ever-mindful that a picture is worth a thousand words, we hereby submit a DVD containing a five minute clip of illustrative excerpts from Dinah Lingo's deposition. Although isolated review of excerpts can never substitute for a full reading of the transcript itself, we believe that clip fairly represents the challenge presented during Dinah Lingo's deposition. Besides, whether the Court reviews the entire transcript or just the sections cited by counsel, when each citation is read in context it becomes clear that Archie Lingo's counsel, Mr. Folt, acted professionally and appropriately while trying to get straight answers from Dinah to questions about Dinah's performance as her mother's putative physical and **financial** custodian, and Dinah responded with undue hostility and animus. Counsel never once raised his voice during the deposition, never once used inappropriate language, never resorted to name-calling or insults and acted professionally by allowing Dinah time to respond and even intervening to protect Dinah's attorney-client privilege when her own lawyers failed to do so. Dinah, in contrast, was openly hostile and uncooperative from the very beginning, opening the deposition by visibly referring to counsel as an "a**hole" under her breath, and then spending the balance of her deposition evading questions, changing her story, threatening to walk out and resorting to pejorative name-calling, referring to counsel at one point as a "skunk."¹

5. Petitioner respectfully invites the Court's review of the complete videotape of Dinah's deposition, as we believe that videotape will best inform the outcome of Dinah's motion. We trust that after reviewing the videotape of the deposition, and seeing the citations referred to in proper *context*, the Court will see that Dinah's motion has less to do with concern over deposition questioning, and far more to do with shifting focus from the merits of motions we recently filed and from her own conduct at issue in this action. For example, the first allegation made in support of the motion is that the examination involved conduct that was "abusive, rude and disrespectful." (Resp. Mot. p. 10) No specific examples are tied to these allegations because none exist. Just because cross-examination is direct and challenging, does not mean that it is abusive, rude, or disrespectful, as each subsequent line of questioning proves, when examined in context. The second allegation focuses on what the Movant inaccurately describes as a "*Miranda*" warning. (Resp. Mot. p. 2) In fact, it was a Fifth Amendment admonition - and one responsibly made to protect Dinah Lingo from criminal self-incrimination - in advance of questions that were intended to solicit facts that would tend to show a violation of 131 *Del. C. § 3913* (see *Bennett v. State of Delaware*, Nos. 296/303, 2006 Cr.Id.No. 0505019622, 0505019765 (Del., Aug. 10, 2007) (observing that a "person is guilty of **exploiting** an infirm adult in violation of 31 *Del. C. § 3913*, if he or she "knowingly or recklessly **exploits** an infirm adult by using the infirm adult's resources.....))." None of these allegations are accurate, nor do they define any conduct prohibited during cross-examination of a material deposition witness.

6. The third allegation concerns the propriety of directing personal questions into the relationship between Dinah Lingo and Kevin O'Connell, her then-boyfriend. At the time of this deposition, before her present counsel was involved in this case, serious concerns existed as to whether Dinah should serve as her mother's primary physical guardian. Among other things, these concerns arose from a newspaper article that described Dinah calling police to her home (the one she shared with her 91 year old mother) to report that Kevin O'Connell had broke into her home, raged for hours at her and her mother, spilled beer on her mother in the middle of the night, and then kidnapped both of them, taking them away in a car, while drunk, to drive them to the Philadelphia airport.² If Dinah Lingo had endangered her mother, Eleanor Lingo, by allowing her known-

parolee boyfriend, to move into her mother's house, that would have been relevant evidence on the question of her fitness to serve as Eleanor's guardian.

7. During her depositions, questions were appropriately directed into this area, and Dinah Lingo resisted all of them with hostility and evasiveness, answering questions inconsistently at times, and falsely on others. The testimony adduced is relevant to her credibility, as mendacity is a key issue in this case, and also is illuminating on merits issues. For example, Dinah admitted that she spoke to police who took her statement and made an arrest of Kevin O'Connell based on her statement, but she later refused to prosecute. If the evidence demonstrates that Dinah refused to prosecute her boyfriend (as she admitted), out of fear of losing him, even though the boyfriend had endangered her and her mother by forcing his way into their home, raging at them for hours, and kidnapping them, then such evidence would prove far more probative of Dinah's fitness to serve as a physical or **financial** guardian than the serial endorsements made in the many unsolicited letters Dinah's counsel sent to this Court.

8. The questions concerning Dinah's relationship with Kevin O'Connell and others were, at times, sensational and highly personal *because* Mr. O'Connell - as he told us during his deposition and in a transcribed interview from prison - was involved intimately with Dinah and another man, and that relationship intruded upon her mother's affairs. Dinah - who frequently attests to her own fitness as Eleanor's **financial** and physical guardian - testified at her deposition that she took her 91 year old mother (in the middle of the night when she typically would be in bed) to her boyfriend's lover's house. She testified that she left her mother alone with Kevin and other men known to Kevin, who would drive her around. Dinah has admitted hiring Mr. O'Connell, her live-in boyfriend, to work on trust properties and she has used trust proceeds to pay and support his lifestyle. These circumstances merit probing as part of the exploration into Dinah's fitness as serving as a guardian for Eleanor. As sensitive and private as they may seem, the evidence being explored leads to the inference that these intimate relationships, and attendant jealousies, have influenced negatively Dinah's judgment and put her mother at risk of serious fiscal and **financial** harm.

9. The next allegation made concerns a snippet of testimony that was taken out of context. If the Court reads the pages leading up to that citation, pages 145-48 in particular, it will see that counsel for Petitioner was being as up front with the witness as he could be, as she stood up and threatened to walk out of the deposition. This was not the first time Dinah had acted up during the deposition, or expressed overt hostility to the examiner, but this time when she threatened to leave the deposition - in an attempt to intimidate the examiner to change topics or quit asking questions - Petitioner's counsel told her frankly what this deposition was about, with requisite candor, so as to alleviate any concerns that she might have that she was being tricked into giving hurtful testimony. Indeed, that exchange proved successful, as it invited no objection (at least for thirteen months) and instead resulted in the witness calming down (temporarily) and resuming her deposition. Of course, any doubts over the propriety of this exchange can best be resolved by watching the relevant section of the video deposition.

10. Most of the residual allegations concern whether counsel can use the words "lie," "lying" or "liar" during cross-examination at a deposition of a fact witness in a non-jury matter in which evidence exists from which one reasonably could conclude that false statements were intentionally made. The fact is no U.S. court, anywhere, has ever to the best of our knowledge, ruled that an attorney in a civil trial cannot ask a witness if they are lying on cross examination. Prosecutors, however, are held to a stricter standard and yet Delaware courts still permit them to refer to a witness as a liar in closing arguments and cross-examination when the evidence permits the inference.

11. The timing and content of this particular motion provoke questions as to its bona fides. Archie Lingo recently filed motions to address concerns about Dinah's conduct during the course of this litigation. Archie was forced to file two discovery motions when Dinah insisted that her deposition go forward before she produced documents requested more than a year ago. Archie was also forced to file a motion for a rule to show cause why Dinah should not be held in contempt of the *Status Quo* Order agreed to by the parties and entered by the Court when Dinah refused to abide by the vote of the status quo trustees, claiming that her lawyers told her she need not do so. Dinah has yet to respond to the motion to compel the long overdue documents she has still failed to produce, and her opposition to the motion for rule to show cause either concedes or fails to respond to most every violation complained of.

12. Because she cannot defend the factual or legal merits of those motions, it appears to us that Dinah has launched a series of retaliatory motions of her own, the primary purpose of which is to flame client and counsel in hopes of somehow poisoning the well of future judgment. This motion is most representative of this breed, and has nothing to do with protecting Dinah against untoward deposition conduct. Dinah's own attorneys attempted twice in the past several weeks to schedule Dinah's deposition - indeed they tried to force the taking of her deposition without ever once mentioning the issues raised in the motion, let alone seeking a protective order. Instead, the motion was filed more than a year after Dinah's initial deposition, and only after Archie filed his recent discovery motions and motion for rule to show cause. Needless to say, if Dinah truly was concerned about the nature of the questions in her deposition, her attorneys would not have been in such a hurry to schedule and force the completion of that deposition without first asking for the relief they now seek.

13. The accusatory tone of Dinah's motion also points the finger in the wrong direction. As a review of the videotape of her deposition quickly reveals, it was Dinah who was rude and evasive throughout her deposition, and when pressed for answers to easy questions, Dinah repeatedly changed her story, recanted her testimony and maintained an openly hostile attitude. Dinah started by muttering expletives directed at counsel, later admitting that she had a chip on her shoulder because she believed Archie's counsel deposed her mother for 4 ½ hours without breaks (the deposition was in fact only 2½ hours, including two ten-minute breaks). The videotape and transcript of Dinah's deposition speak for themselves. For purposes of this brief, we have compiled examples of Dinah's behavior during her deposition, both from her transcript (as set forth below) and from the videotape (as seen in the attached DVD), and we invite the Court to review of the videotape in its entirety. Still, despite all this, we both suggest and welcome the appointment of a special discovery master to supervise the completion of Dinah's deposition, with costs to be borne equally by the parties.

DISCUSSION

14. The primary complaint in Dinah's motion is that Archie's counsel repeatedly questioned Dinah as to whether she was testifying falsely or evasively. Dinah tries to make her case by citing to selected portions of her transcript, almost always taken out of context. As the complete transcript and videotape confirm, however, Dinah was hostile from the beginning of her deposition and repeatedly changed her testimony or gave wholly inconsistent testimony when challenged by counsel. Examples abound, but the excerpts of Dinah's transcript that follow show some of her more egregious misconduct and fabrications.

15. Dinah's conduct quickly became hostile during her deposition. Early on, counsel asked Dinah if she needed a break, and Dinah responded by accusing counsel of mistreating Eleanor by keeping her in a deposition for 4 ½ hours and refusing to give her a break or something to drink:

Honestly, I think this deposition is going to run most or all of the day, so I'm sure you'll want to take a lunch recess and the usual break periods. But I - whatever your judgment is on that.

MS. MULLEN: Dinah?

THE WITNESS: I'm okay. It's more than you offered my mother.

BY MR. FOLT:

Q. What does that mean, Ms. Lingo? You just seemed to say something. What do you mean, when -

A. it doesn't matter, sir.

Q. Well, Ms. Lingo, you just volunteered, without a question pending, more than I offered your mother. That seemed to be directed towards me with an air of hostility. I don't know. Maybe I'm misperceiving that, but it's on the video in either - in either event.

A I don't know if it was you or your company, sir.

Q. Well, was there a problem with your mother that you can tell me about?

A. Yes.

Q. What's that?

A. A 91-year-old woman you badgered for four and a half hours, didn't give her a break,³ didn't offer a cup of tea, cookie or anything.

Q. Didn't give her a break - let me get this all down.

A. I'm finished with you.

Q. Okay. And you said that your mom didn't get any breaks for the four-hour period; is that right?

A. The whole time she was there, she never came out of the room.

Q. There were breaks in the deposition, weren't there, Ms. Lingo?

A. I don't know, sir. I wasn't in the room, sir.

Q. But you were out in the hallway, weren't you?

A. Yeah. My mother never came out of that room.

Q. And, in fact, you approached me and started yelling at me during one of those breaks, didn't you?

A. Yes, I did.

The deposition of Eleanor Lingo in fact lasted only 2 and 1/2 hours, including two ten-minute breaks, and Eleanor was treated with utmost respect and care and offered water on several occasions. (*See* Eleanor Lingo Transcript)

16. Dinah then became even more belligerent, referring to counsel as a “skunk” and threatening to leave the deposition:

Q. Please answer the question. When you said that there were not any breaks, Ms. Lingo, you did not tell the truth, did you?

A. in your terms, I guess not sir. You should know. You shouldn't have to ask me. You were there.

Q. Well, Ms. Lingo -

A. Look sir, I don't want to be in a pissing contest with a skunk. Just ask me normal questions, or I will walk out of here now.

(Dinah Tr. at 51)

17. After setting a tone of open hostility, Ms. Lingo spent the balance of her deposition evading questions and changing her testimony time after time. For example, when confronted about a criminal incident in which Dinah's live-in boyfriend, Kevin O'Connell, reportedly assaulted Eleanor and Dinah and held them hostage,⁴ Dinah first tried to downplay the story to protect Mr. O'Connell. Dinah testified first that Mr. O'Connell stopped by and that she simply asked him to take her and Eleanor to Happy Harry's to run an errand:

Q. All right. So after you opened the door on May 26th, what happened next?

A. My mother - my mother and I left with - he drove us out to my friend's house and out on the - I just asked him, Drop us off first at Happy Harry's. We'll just get out, because I had to get my mother's prescription.

Q. Did you ask Mr. O'Connell to give you a ride?

A. No. Mr. O'Connell doesn't drive.⁵

Q. You just told me that Mr. O'Connell drove us out -

A. He has a friend has a car.

Q. Well, wait a second. Let me finish my question.

Your answer said, My mother and I left. He drove us out to my friend's house.

That was your answer. Are you taking that back now?

A. Yes, I am.

Q. Okay. Truth was he was driving you; isn't that right, Ms. Lingo?

A. No, he wasn't.

Q. You told the police he was driving you, didn't you?

A. No. I told the police that he was in a car with somebody else, a Chevrolet.

Q. Please remember you're under oath, Ms. Lingo.

You deny that you told the police that Mr. O'Connell -

A. I said Mr. O'Connell took us with another man and dropped us off out - first, I got out at Happy Harry's, and then I got my mother's prescription. Then I went to Mr. Osborne's house.

Q. Out at Happy Harry's, then Mr. Osborne's house?

A. Yes.

Q. And Mr. O'Connell was driving; right?

A. And his friend, and they left.

Q. So you think it was reasonable to have your mom in the car with Mr. O'Connell at that time, even though he was falling-down drunk?

A. Well, he was hurting my mother. ⁶ I was just going out to get a ride out to my friend's house.

Q. Did you ask Mr. O'Connell for that ride?

A. No, I didn't.

Q. Then -

A. They were just going that way, and I needed a ride. My car wouldn't start again.

Q. How is it that you got into the car with him, then, if you didn't ask him for a ride?

A. I asked him after my car wouldn't start if I could have a ride. They were going out on the highway, and they were going to where I was going, towards the way I was going.

(Dinah Tr. at 154:21 - 156:12; 157:7-23) (emphasis added) When later confronted with a newspaper report of the incident, however, Dinah completely changed her story, admitting that Mr. O'Connell had in fact come in the middle of the night, forced his way into Eleanor's home, fought with and assaulted Dinah, spilled beer on Eleanor, and forced Eleanor into his car in the early hours of the morning:

Q. Did you ask the police to arrest Mr. O'Connell for kidnapping you?

A. No, I didn't, because he didn't kidnap me. I asked them to arrest him because he smacked me.

Q. What did the police say?

A. They took pictures and they left. I guess - and then they went looking for him.

Q. Do you know if they found him?

A. I think they did. They put him in jail.

Q. When was he put in jail?

A. A week ago now.

Q. Okay. All right. Now, it says about 11:45 p.m. on May 26th, Mr. O'Connell showed up at your home and demanded to be let in; is that true?

A. Yes.

Q. Okay. The article next says the victims - I guess that means you - later told police he appeared to be intoxicated and he refused to leave the property. Is that true?

A. That's right.

Q. Okay. The article next says, when he threatened to kick the door in, the former girlfriend opened the door to prevent him from damaging it. Is that true?

A. I thought if I opened the door, I could calm him down and he would just calm down and go away.

Q. I understand that. But it says here he threatened to kick the door in. Is that true?

A. No.

Q. That's - the article is wrong there?

A. He just said, "Let me in."

Q. Okay. Then it goes on to say, Mr. O'Connell allegedly charged in, grabbed her - which I assume means you?

A. Right.

Q. -- by placing both hands on your neck and started choking her. Is that true?

A. No, its not true.

Q. So that's just all made up?

A. He shoved me and smacked me. He didn't strangle me, sir.

Q. Okay. So he shoved you again?

A. Well, he wanted me to listen to him about my brother attacking him.

Q. Well, one moment you say he shoved you, and another moment you fell on the dogs.

A. That was the first time, sir, you told me. I told you again when I came back in the dining room, he smacked me again.

Q. I'm not saying anything is true in here. I'm just asking you if you know, since you were there. I wasn't there. Nobody here is saying that this is true. They're just saying this is a newspaper article, which at times are often inaccurate. Who knows? That's why we're asking you these questions.

So let's go on. The article goes on to say that for the next three hours, the victims reported he raged at the woman and periodically assaulted you. Do you see that?

A. Where?

Q. That's in - down about here in the article. Did you tell the police that Mr. O'Connell raged at you?

A. I said he wouldn't shut up. He kept hollering at us.

Q. Did you use the word "raged"?

A. No, I didn't.

Q. Okay. Did he - did this go on for three hours?

A. I don't know how long it went on.

Q. What time did you get to Ron's house?

A. I got to Ron's house - I don't know what time it was I got to Ron's house.

Q. Was it 3:00 or 4:00 in the morning?

A. No.

Q. Was it early in the morning?

A. it must have been the early part of the morning.

Q. 2:00 in the morning?

A. 2:00 in the morning? No, I didn't say anything about -

Q. I'm just trying to narrow it down. Can you narrow it down for -

A. I'm just reading the article, sir. I'm getting to what it says here.

Q. Well, but my - it said earlier in the article - and you said it was true - that this started at about 11:45 p.m. May 26th That's almost midnight on Friday.

A. Yes.

Q. And you said that was true. And so the article goes on to say, later in the part we're looking at, that for the next three hours, the victims reported he raged at the women and periodically assaulted you, the former girlfriend.

A. I got to Ron's sometime the next morning.

Q. Was it daylight?

A. Yes.

Q. So did Mr. O'Connell continue this abusive pattern from midnight to daylight?

A. No. He passed out.

Q. What time did he pass out?

A. I don't know. I was just so happy he shut up.

Q. Was it daylight when he passed out?

A. I don't think so.

Q. Okay. It then says that he periodically assaulted you over a three-hour period. Is that true?

A. No, he didn't, sir.

Q. Did you tell the police that he did either of these things?

A. No. I said he shook a bottle of beer up and it sprayed all over us.

Q. Okay.

A. Over me, really.

Q. When did he do that?

A. After he woke up.

Q. What prompted him to pour beer on you and perhaps

Eleanor?

A. He didn't pour beer on me (sic). He poured beer on me, because I wouldn't talk to him.

Q. Well, you first said, "It sprayed all over us." Was that another false statement?

A. Shook the beer up. It went all over me. Me.

Q. When you said - it's your word, "us". Are you taking that word back now?

A. No, sir, I'm not.

Q. Okay. So the beer got on both you and Eleanor?

A. it got a little bit on the bottom of my mother's covers, the bottom of her bed.

Q. He was - was Eleanor in bed when this happened?

A. Yes, my mother was in bed.

Q. And he came into her bedroom?

A. Because I was in there.

(Dinah Tr. at 176:2-13; 187:14- 189:11; 190:17- 193:3; 216:18 -218:5) (emphasis added)

18. Dinah went on to reveal in her deposition that notwithstanding Mr. O'Connell's assault on her and endangerment of Eleanor, Dinah allowed Mr. O'Connell to return to the house next door to do work on a Trust property for which she paid him. (Dinah Tr. at 195-96) When confronted with questions about whether Mr. O'Connell had called Archie's daughter on Eleanor's phone and made abusive comments while on the Trust property the following day, Dinah first tried to disclaim any knowledge of the call: ⁷

Q. Okay. Did you see Jessica at all yesterday?

A. No, I didn't.

Q. Did you talk to Jessica at all?

A. Yes. She called me, but I didn't get to talk to her.

Q. When did she call you?

A. I think it was near dinnertime, 6 o'clock. I saw her number on my cell, and I called her to see if she called me. And she said, no, she hadn't called me. I thought she had called me, but she didn't.

Q. And that's all you discussed?

A. That's all I discussed with Jessica and myself.

Q. And you didn't talk to her anymore?

A. No. I had to get up to be up here at a certain hour. I had to get up early and walk my dogs before I even leave.

(Dinah Tr. at 197:18 - 198:12) When Mr. Folt inquired further, however, Dinah quickly changed her story, claiming that Mr. O'Connell took her phone and called Archie's daughter while she was standing next to him, but that she somehow didn't hear anything that Mr. O'Connell said even though he was hollering:

A. I think he talked to Jessica herself.

Q. You think he talked to Jessica's cell?

A. I said I think he talked to Jessica herself.

Q. How do you know that?

A. He told me so.

Q. When did he tell you that?

A. On the telephone, sir?

Q. At what time? Or which one of these calls?

A. I think it was the later one?

Q. The 11 o'clock call?

A. Yes.

Q. Why didn't you tell me that when I asked you what was discussed in the 11 o'clock call?

A. He just said he talked to Jessica. I don't know what he said to her. I wasn't -- I wasn't in the space they were talking. How am I supposed to know from a cellphone of what people say?

Q. But that's an absolute lie, isn't it, Ms. Lingo?

A. Why is it sir?

Q. Because you were on the phone talking to Jessica when Mr. O'Connell, standing next to you, took your phone out of -

A. Yeah.

Q. -- his hand and started to threaten Jessica; isn't that true?

A. I didn't hear what they said, sir. I was on 310's property. He took my cellphone out of my hand on 310's property. How am I supposed to know what they're saying? The phone's to their ear, sir, not mine.

Q. Well, help me understand, Ms. Lingo -

A. How am I supposed to know what they say?

Q. -- how, prior to my challenging you for lying, you told me you saw Mr. O'Connell on 310's property -

A. Right.

Q. -- and he was there and you discussed only work - that's what you said; right?

A. Right, right. I discussed only work with him, yes.

Q. Well, so you lied to me -

A. Why?

Q. -- about what happened, then didn't you?

A. He took - he took my cellphone and talked to my niece himself. I don't know what they said.

Q. You were standing there when -

A. At 310, when he - he grabbed my cellphone. He said, "Who are you talking to?"

I said, "I'm talking to Jessica."

He took my cellphone. I didn't hear what they discussed. I didn't know he talked to her in any type of way until later in the evening. Because she never called me back to say -

Q. Do you deny being present when Mr. O'Connell, on your phone, verbally threatened Jessica?

A. I didn't hear him threaten her at all. I heard him holler at her. I was not - he took the phone and walked away from me, sir. I don't know what he said.

Q. What did he holler?

A. I don't know. He says, "You and your father," is all I heard him say. "You and your father." I have no idea what he said.

(Dinah Tr. at 199:5 - 202:6)

19. Dinah continued to testify dishonestly throughout her deposition. Among other things, Dinah testified that she never wrote checks from the Trust account to herself and that she did not have her own checking account (Dinah Tr. at 260- 261); but we have since obtained documents showing just the opposite - Dinah in fact wrote many checks to herself and she has her own large checking account (with a balance of over \$100,000), funded entirely from money she took from Eleanor.

20. The law is also unhelpful for Dinah. No court has found questions about whether a witness is being truthful to be actionable (that is perhaps why Dinah offers no legal authority whatsoever in support of her motion), and even prosecutors are permitted to refer to a witness as a liar where the evidence warrants. In *Hughes v. State*, 437 A.2d 559, 571 (Del. 1981), our Supreme Court first set forth the rule that "the Trial judge must prohibit a prosecutor from calling the testimony or statement of a witness or party as a 'lie' *unless*, (a) that is a legitimate inference which may be drawn from the evidence and (b) the prosecutor relates his argument to specific evidence which tends to show that the testimony or statement is a lie." *See also Clayton v. State*, 765 A.2D 940, 942-43 (Del. 2001) (noting prosecutors may refer to testimony as lies when the "prosecutor relates his argument to specific evidence which tends to show that the testimony or statement is a lie."); *Smith v. State*, 913 A.2d 1197, 1225-26 (Del. 2006) (leaving for another day the decision whether these restrictions apply to cross-examination).

21. Although no Delaware courts has yet imposed any similar restrictions on attorneys engaged in cross-examination in civil cases, in *Murphy v. International Robotics Systems, Inc.*, 766 So.2d 1010 (Fla. 2001) the Florida Supreme Court upheld counsel's right to refer to a witness as a liar based upon its prior observation that "when counsel refers to a witness or a defendant as being a 'liar,' and it is understood from the context that the charge is made with reference to testimony given by the person thus characterized, the [attorney] is merely submitting to the jury a conclusion that he is arguing can be drawn from the evidence." *Id.* (citing *Craig v. State*, 510 So2d 857, 864 (Fla. 1987). "A majority of U.S. courts that have resolved the issue have done so consistent with *Murphy* during civil or criminal trials, and they provide guidance in identifying closing arguments that have received appellate approval." Craig Lee Montz, CALLING THE WITNESS A LIAR DURING CLOSING ARGUMENT: THE FLORIDA SUPREME COURT'S FINAL APPROVAL, Column, Trial Lawyers Forum, 75-OCT Fla. B.J. 49.

22. Substantial scholarly support exists for the practice of using the words "lie," "liar," and "lying" during cross-examination and closings. "It is widely recognized that counsel in arguing a case to the jury may comment on the credibility of a witness where his remarks are based on facts appearing in the evidence. 75A Am. Jur. 2d § 692, Argument and Conduct of Counsel, cmt. "Thus, it is not error to describe a party or a witness as a liar where supported by the evidence or inferences drawn therefrom, or to assert that the defendant is lying if the evidence is conflicting, or where the witness made contradictory statements, or to cast aspersions on the veracity and credibility of defendant's witnesses where the witnesses had admitted that they had perjured themselves before the grand jury." *Id.* Even James McElhaney, a frequent fixture in the ABA Journal who is well

renown for his writing on trial procedures, upheld the practice in an article extolling as “magic” the mock cross-examination conducted by Michael Tigar at the fall meeting of the ABA Section of Litigation in Washington D.C. James W. McElhaney, *LIAR!, DEALING WITH DISHONESTY IN THE COURTROOM*, ABA Journal, Practice Tips, 80-JAN A.B.A.J. 74 (1994). McElhaney cites with approval a passage from Tigar's book, examining witnesses, in which the author admonishes “[y]ou will, in trying cases, come to label many witnesses as liars and should not shrink from this duty when the occasion demands.” *Id.* Indeed, Tigar's book provides many examples of when the use of words “lie,” “liar,” and “lying” may be effectively used during cross-examination. Michael E. Tigar, *EXAMINING WITNESSES*, ABA Section of Litigation (2nd ed. 2003), pp. 221-35.

23. in cross-examination, specifically, there are numerous cases in which Q&A involving words like “lie,” “liar,” and “lying,” as well as time tested phrases such as “were you lying then, or are you lying now,” were unsuccessfully challenged. *See, e.g., State v. Tripplett*, 2007 WL 64690 (Ohio App. 8 Dist. Jan. 11, 2007) (“Were you lying then?”); *Alexander v. State*, 875 So.2d 261 (Miss.App. 2004) (“Now, I have to ask you were you lying then or are you lying now?”); *State v. Ellis*, 657 So.2d 341 (La.App. 4 Cir. 2004) (“[w]ere you mistaken or were you lying then?”). In sum, all these cases, treatises and authorities stand for the proposition that during the regular cross-examination of a witness, especially out of the presence of a jury in a civil action, no prohibition exists that would bar questions of the type challenged here.

24. Given Dinah's own conduct and lack of candor, it is no surprise that Dinah's motion quotes from portions of the transcript showing the handful of times from a day-long deposition covering hundreds of questions when counsel suggested in a question that Dinah was being untruthful. Dinah is careful, however, to omit much of her own testimony preceding and following those questions, because that testimony shows that the questions were in response to Dinah either being evasive, changing her testimony or being openly hostile.

25. One exchange from Dinah's deposition is particularly illustrative. After hours of Dinah changing her testimony and being uncooperative, counsel asked Dinah directly whether a newspaper account was true, in which it was reported that after raging against Dinah and Eleanor for hours, Kevin O'Connell suddenly got the notion of taking the two women to the Philadelphia International Airport.⁸ (Dinah Tr. at 230) Dinah flatly denied that report: Do you see that?

A. Yes. That's not true at all.

Q. That's not true?

A. No.

(Dinah Tr. at 230) (emphasis added) Then, when pressed on the issue for several minutes, Dinah finally admitted that Mr. O'Connell had in fact tried to take Dinah and Eleanor to the airport, leading counsel to express his frustration that it took nearly thirty minutes of deposition time to get an honest answer to a simple question:

Q. Did you tell the police that Mr. O'Connell took you or threatened to take you to [the] Philadelphia airport?

A. No. I told the police that he suggested we go to the Philadelphia Airport. And I said I'm not going anywhere. Just drop me off at Ron's.” He said, “Fine.” He drove us right there.

Q. Ms. -- Ms. Lingo, why id it take me a half hour of questions to get you to raise the Philadelphia Airport? Are you just trying to pick at my words -

A. Because I don't believe everything -

Q. -- to avoid answering the question?

A. I don't believe everything everybody says. A lot of people say a lot of things when they're drunk and mad.

(Dinah Tr. at 233) (emphasis added)

26. The videotape of Dinah's deposition ultimately is the best evidence that Dinah's motion for protective order should be denied. The videotape shows that Dinah was hostile from the beginning of her deposition renders farcical the suggestion that she was "intimidated." Indeed, the video shows that Dinah was being untruthful and evasive - constantly changing her story and conceding portions of facts only when directly challenged. In other words, the video proves that Dinah was a difficult and untruthful witness, and suggests that this motion was brought to preempt that conclusion by diverting attention on counsel. In our view, in order to ensure the timely completion of Dinah's deposition, without further difficulty, her deposition should be concluded in the presence of a special discovery master, so objections can be raised and ruled upon in real time, and the deposition completed in an orderly and efficient manner.

WHEREFORE, Archie Lingo respectfully requests that the Court deny Dinah Lingo's motion for protective order and instead enter an order appointing a special discovery master to observe Dinah's continued deposition, with the costs of the master to be split among the parties.

DATED: August 16, 2007

DUANE MORRIS LLP

/s/ Daniel V. Folt

Daniel V. Folt (Del. I.D. No. 3143)

Matt Neiderman (Del. I.D. No. 4018)

1100 N. Market St., Suite 1200

Wilmington, DE 19801

302.657.4900 (telephone)

302.657.4901 (facsimile)

Attorneys for Plaintiff

Footnotes

- 1 Attached as Exhibits "B" and "C" to our opposition are: (1) a DVD with excerpts from Dinah Lingo's deposition showing examples of her hostile and evasive conduct and (2) a copy of the complete videotape of Dinah's deposition.
- 2 A copy of that newspaper article is attached as Exhibit "D" to this paper.
- 3 The transcript and all available direct evidence proves that this statement was a "lie," meaning an intentionally false statement made by Dinah in hopes of casting examining counsel in a negative light. Dinah was present at her mother's deposition, she witnessed each break and visited with her mother inside the conference room during those breaks. Dinah could not have been mistaken about these facts, and when questioned further, she slowly concedes the truth, albeit reluctantly. This was a pattern that repeated itself throughout her deposition.
- 4 It bears repeating that the answers to these questions were material because, among other things, Dinah's judgment in sharing her mother's house and money with criminals should make more or less likely a key fact of consequence - that is, whether she has the requisite judgment to serve as Eleanor Lingo's physical or **financial** guardian.

- 5 We know this is another intentionally made false statement, i.e., a “lie,” because Dinah later reluctantly testifies that Kevin O’Connell drove a limo while intoxicated that same evening.
- 6 Dinah later denies this, impeaching herself on matters that one seeking appointment as Eleanor’s guardian should have no dissonance.
- 7 This is another sequence that, if viewed on video in complete context, constitutes strong evidence that Dinah was intentionally trying to withhold testimony pejorative to herself and Kevin O’Connell, and in doing so was indeed lying about threatening behavior in response to direct questions posed.
- 8 This act of deception was not related to collateral facts. If Dinah’s live-in boyfriend indeed had forced entry into Eleanor Lingo’s house, forcibly kidnapped Dinah and Eleanor, and driven them while drunk towards the Philadelphia airport, Dinah would rightfully be questioned about her judgment in letting this man into her mother’s home, not to mention her judgment in dropping charges she initiated against him. One suspects a faithful guardian would not have let personal feelings for Mr. O’Connell so influence them.

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.